Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

WILLIAM SCHEFFLER,

Petitioner,

v.

DOW JONES & COMPANY, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an individual suffering from a debilitating sleep disorder, specifically, shift-work sleep disorder can qualify under the Americans With Disabilities Act as a disabled person when the shift-work sleep disorder interferes with the major life functions of working and sleeping.

2. What is the appropriate standard to be applied by a court in determining whether a particular aspect or duty of a job is an essential function of the job and can an employee rely on his/her job description as an accurate statement of the essential functions of his/her job.

3. When a work schedule change is medically indicated as a reasonable accommodation of an employee's qualifying disability, what is the analysis the lower courts must utilize in determining the reasonableness of an employer's proposed schedule change.

4. Once an employer decides that an employee can not perform the essential functions of his job, can the employer deny an employee long-term disability benefits under a plan which provides benefits when an employee is unable to perform "all" the duties of his job. What is the appropriate level of scrutiny a court must apply when evaluating an employer's arbitrary, capricious and unreasonable denial of long-term disability benefits.

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The petitioner, William Scheffler, respectfully petitions the Honorable Court to issue a Writ of Certiorari to review the June 17, 1999 Order of the United States Court of Appeals for the Third Circuit affirming the United States District Court for the District of New Jersey decision dismissing petitioner's ADA claim on respondent's motion for summary judgment.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey is appended hereto as Appendix B. The opinion of the United States Court of Appeals for the Third Circuit is appended hereto as Appendix A. These decisions are unpublished to petitioner's knowledge.

STATEMENT OF JURISDICTION

On June 17, 1999, the United States Court of Appeals for the Third Circuit affirmed the decision of the United States District Court for the District of New Jersey and upheld the dismissal of petitioner's complaint on summary judgment. This Petition for Writ of Certiorari was filed within ninety days of the June 17, 1999 decision of the Third Circuit Court of Appeals. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12102(2), of the Americans with Disabilities Act of 1990 reads in pertinent part:

> As used in this chapter:
>
> * * * *
>
> Disability. — The term "disability" means, with respect to an individual —
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual
>
> (B) a record of such impairment; or
>
> (C) being regarded as having such an impairment

42 U.S.C. §§ 12111(8) and (9) of the same Act reads:

> (8) Qualified individual with a disability. — The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. — The term "reasonable accommodation" may include —

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. §§ 12112(a) and (b)(5)(A) state:

(a) General rule. — No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment.

(b) Construction. — As used in subsection (a) of this section, the term 'discriminate includes —

* * * *

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

29 C.F.R. § 1630.2 states in pertinent part:

> (g) Disability means, with respect to an individual — (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) A record of such an impairment; or (3) Being regarded as having such an impairment.(See Sec. 1630.3 for exceptions to this definition).
>
> (h) Physical or mental impairment means: (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(j) Substantially limits — (1) The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity. (2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity: (i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. (3) With respect to the major life activity of working— (i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. (ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether

an individual is substantially limited in the major life activity of "working": (A) The geographical area to which the individual has reasonable access; (B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or (C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * * *

(m) Qualified individual with a disability means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. (See Sec. 1630.3 for exceptions to this definition).

(n) Essential functions — (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the

marginal functions of the position. (2) A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. (3) Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

(o) Reasonable accommodation. (1) The term reasonable accommodation means: (i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position

held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or (iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities. (**2**) Reasonable accommodation may include but is not limited to: (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. (3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari seeks review of the decision of the United States Court of Appeals for the Third Circuit dated June 17, 1999 which affirmed the United States District Court for the District of New Jersey. The District Court dismissed petitioner William Scheffler's complaint asserting a claim under the Americans with Disabilities Act and an improper denial of long term disability benefits.

Petitioner William Scheffler, a radio newscaster/writer suffers from the disability of shiftwork sleep disorder that substantially limits one or more of his major life activities including working and sleeping. Scheffler was terminated from his employment with Dow Jones without a reasonable accommodation for his disability. At the same time that his employer refused to accommodate Scheffler's disability, his employer also denied Scheffler's claim for long term disability benefits.

Petitioner Scheffler was hired by Dow Jones on June 4, 1984 as an "audiotex newscaster." In August 1991, Scheffler was offered a position as a "newscaster/writer" under his union contract. The full published job description for newscaster writer was:

> Duties include selecting appropriate stories from various sources, and writing them as cohesive scripts of prescribed length. Also broadcast these scripts on radio news services.

In 1992, there was an expansion of broadcasting operations at Dow to twenty-four hours a day weekdays, starting Sunday evenings at 8:00 p.m., and continuing

through Friday nights at 11:00 p.m. Previously, operations ended weekdays at 10:00 p.m. When Dow expanded the broadcasting operations, Scheffler was informed by the new management that he was to be the "swingman" who would cover any vacation or sick time "holes" in the newscaster/ writer work schedule. This was contrary to his published job description. Scheffler's work schedule began changing as frequently as three or four times per week, and work times were scheduled anywhere within the 24-hour day.

By September 1, 1994, some eighteen months later, Scheffler began complaining about medical problems caused by frequent and abrupt schedule changes. Dow ignored his complaints, and by the following Spring, his medical problems caused by the schedule changes became so severe that he sought help at the Comprehensive Sleep Disorders Center at the Robert Wood Johnson University Hospital in New Brunswick, New Jersey. His medical problems were diagnosed as "Shiftwork Sleep Disorder," which was described as a "real illness" that involves difficulty in adapting one's internal hormonal cycles to changes in sleep schedules.

Scheffler's medical problems continued to worsen such that he developed a persistent high blood pressure problem that remained dangerously high even after taking medication. He developed an irregularity of his heartbeat. On April 22, 1994, Scheffler blanked out while driving his car, causing a motor vehicle accident. Scheffler suffered from migraine headaches as a result of the shiftwork sleep disorder in addition to his other medical problems.

In February 1995 after one particularly severe swing in shifts, Scheffler called out sick with a migraine headache

and went to see his personal physician who determined that Scheffler's blood pressure problem had not resolved with medication and his pressure was dangerously high. Scheffler's physician placed him on disability leave at that time.

Respondent sent Scheffler to its own physician, Dr. Papo who also determined that Scheffler suffered from shiftwork sleep disorder. Dr. Papo asserted in the documentation he provided to Dow that Scheffler should not return to work on anything other than a fixed daytime schedule. Later, on May 4, 1995 Dr. Papo wrote that Scheffler could return to his regular duties on a modified work schedule. A psychiatrist who examined Scheffler on behalf of Dow Jones determined that if Scheffler was returned to his prior work schedule, he would likely suffer a relapse of the symptoms he experienced as a result of his shiftwork sleep disorder. The medical practitioners who examined Scheffler repeatedly and consistently asserted Scheffler's need for a fixed day shift. Dow asserted that working the erratic, swinging shifts was an "essential function" of Scheffler's job.

Dow's first proposed schedule modification would have Scheffler scheduled to work any hours except 5:00 a.m. to 10:00 a.m and Scheffler's schedule would be fixed weekly. However, this schedule could still involve as many as forty-seven (47) schedule changes a year, with a possible difference of 13-hours in starting times. Later, in December 1995, Dow proposed a schedule which "blacked out" the hours of 11:00 p.m. to 5:00 a.m. Still, this proposed schedule had the potential for forty seven (47) schedule changes per year. Petitioner asserts that this purported accommodation of his schedule was not a reasonable accommodation given the assertions of the physicians who treated and examined him

and given the nature and extent of his disorder. Based on the medical advice he received, Scheffler refused to return to work under these unreasonable conditions and remained on short-term disability.

On August 17, 1995, Dow Jones notified Scheffler that his short-term disability benefits would soon expire. Accordingly, Scheffler and his treating physician, Dr. Moore completed a long-term disability benefits application in which Dr. Moore stated that Scheffler needed "regular daytime working hours with less deadline time pressure."

During his employment with Dow, Scheffler received a copy of Dow's benefits handbook that sets forth various policies and benefits applicable to Dow Jones employees including Scheffler. The benefits handbook includes a section on Long-term Disability Benefits ("LTD"). The policy states

> To receive LTD benefits you must be considered "totally disabled" This means that during the first 24 months of LTD benefits, you are unable to do all of the duties of your regular job, and after 24 months of LTD benefits, your disability prevents you from doing any gainful work for which you are reasonably qualified by training, education or experience.

The standard for the first 24 months is no different than for short term disability. Scheffler's condition clearly met this definition.

Scheffler's medical condition was such that as long as Dow insisted that he work a non-stable schedule, he was unable to do "all" of the duties of his job, particularly the

swinging shifts Dow asserted were an "essential function." Still, on December 1, 1995, he was denied LTD benefits. He appealed this finding through Dow's internal appeal procedure and on August 22, 1996 his appeal was denied. On December 26, 1995, Scheffler was notified that he would be terminated from his employment with Dow Jones if he did not return to work by the end of the year. When Scheffler did not return, he was terminated.

Petitioner then sued Dow Jones in Federal District Court in Newark, New Jersey asserting a violation of 42 U.S.C. § 12101, *et seq.*, The Americans with Disabilities Act, and claiming that Dow Jones improperly denied Scheffler long-term disability benefits. The jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 1331. After discovery was completed, Dow Jones filed a motion to dismiss the complaint on summary judgment. On April 15, 1998, the Honorable Dickenson R. Debevoise, granted Defendant's motion for summary judgment and dismissed all counts of the Complaint. Petitioner then timely appealed to the United States Court of Appeals for the Third Circuit. On June 17, 1999, the Third Circuit Court of Appeals affirmed the District Court's dismissal of the Complaint. Pursuant to United States Supreme Court Rule 13, this petition is timely filed within ninety (90) days of the final decision of the United States Court of Appeals for the Third Circuit. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

REASONS FOR GRANTING THE WRIT

I.

SLEEP DISORDERS SUCH AS SHIFTWORK SLEEP DISORDER DO QUALIFY AS DISABILITIES UNDER THE AMERICANS WITH DISABILITIES ACT

A. The Severity Of Scheffler's Sleep Disorder Must Require That He Receive ADA Protection From Discriminatory Termination

The shiftwork sleep disorder that Petitioner Scheffler suffered with for many years does qualify under the legal definition as a disability triggering the protections set forth in the Americans with Disabilities Act. Unfortunately, this little known disorder has received short shrift from the court below and the few other courts that have considered the ailment. Shiftwork sleep disorder is not like the disabilities thought of as more prevalent or quantifiable like blindness or the lack of a limb. This disorder is not so tangible and understood. Nonetheless, the Americans with Disabilities Act clearly applies to shiftwork sleep disorder and should offer sufferers protection against discrimination.

Under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12102 disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2)(A). The Code of Federal regulations expounds upon the definition of disability and the substantial impairment of major life activities. It defines physical impairment as:

> Any physiological disorder, or condition, disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine. 29 C.F.R. § 1630.2(h)(1).

Under this definition of impairment, shiftwork sleep disorder must qualify as a physical impairment under the ADA. The physicians who examined Scheffler on behalf of Dow Jones acknowledged that shiftwork sleep disorder resulted in sleep deprivation, hypertension, dysautonomia, adrenal over-activity and impaired motor function. It affects the hormonal cycle. At a minimum, Scheffler's shiftwork sleep disorder does qualify as a physiological disorder as it affects the neurological, cardiovascular and endocrine systems.

In addition to being a debilitating illness that results in a physical impairment for the sufferer, shiftwork sleep disorder does substantially limit major life activities. Under the Code of Federal Regulations, major life activities can include but are not limited to:

> Caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. . . . sitting, standing, lifting, reaching. 29 C.F.R. § 1630.

Substantially limits means:

> Unable to perform a major life activity that the average person in the general population can

> perform or significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity. 29 C.F.R. § 1630.2(j)(i) – (ii).

Scheffler's shiftwork sleep disorder limits his major life activities of working and sleeping. He also has difficulty with driving because of his sleep disorder.

There are few reported federal decisions that address the issue of a disability's limit on the major life activity of working. Although the Third Circuit decision below does not discuss whether petitioner's shiftwork sleep disorder qualifies as a disability under federal law, the District Court below applied an erroneous standard in deciding whether shiftwork sleep disorder is a disability. The District Court essentially applied a "common infirmity" test to petitioner's shiftwork sleep disorder and held that because the court concluded that shiftwork sleep disorder was a common ailment, it likely would not qualify as a disability. Nothing in the ADA's statutory framework, or the case law interpreting the ADA has ever applied a test whereby "common" disorders do not qualify under the ADA as disabilities. In fact, in a prior Third Circuit decision the court acknowledged that numerous factors not just the prevalence of a disorder must be considered in deciding whether a disability qualifies for ADA protection. While the Third Circuit did not directly address the issue of whether Scheffler's shiftwork sleep disorder is a qualifying disability, implicit in its decision is the acceptance of the District Court's analysis on this issue. Thus, petitioner raises in this

Petition for Writ of Certiorari the assertion that his shiftwork sleep disorder was sufficiently severe to qualify as a disability under the ADA.

In *Mondzelewski v. Pathmark Stores*, 162 F.3d 778 (3rd Cir. 1998) the Third Circuit acknowledged that numerous factors should be considered in determining whether a particular type of disability limits the major life activity of working. The court stated, "a person's expertise, background, and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled." *Id.* citing, *Webb v. Gorelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996). In *Mondzelewski*, the court also noted that what might be a substantially limiting impairment for one individual may not be substantially limiting for another. In the present matter, Scheffler presented substantial evidence to demonstrate that his particular case of shiftwork sleep disorder was sufficiently severe to render it a protected disability under the ADA. *See also Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986); *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 498 (3rd Cir. 1997).

The relevant regulations set forth in the Code of Federal Regulations clearly contemplate a more detailed analysis of the impairment of working than the "common ailment" test applied below. The regulations at 29 C.F.R. § 1630.2 require that a court consider

> The number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training.

No court that has heard Scheffler's case has ever considered his ability to obtain alternative employment given his training that is exclusively in the area of radio broadcasting. Many radio networks do broadcast overnight and many positions relevant to Scheffler's training may require schedule shifts.

To Petitioner's knowledge, only two reported lower court decisions dealing squarely with shiftwork sleep disorder even exist. In *Williams v. City of Charlotte*, 899 F. Supp. 1484 (W.D.N.C. 1995) the court asserted that Plaintiff's shiftwork sleep disorder did not qualify as a disability under the ADA because Plaintiff's disability was too common. Apparently the District Court below in this matter would extend the holding in *Williams* to preclude all shiftwork sleep disorder sufferers from ADA protection. However, other cases addressing the issue of a disability's impairment of the ability to work have set forth a sliding scale analysis which considers the severity of the illness in addition to the particular individual's employability. *Olson v. General Electric Astrospace*, 101 F.3d 947, 952 (3rd Cir. 1996).

The decision below in the present matter has essentially extended *Williams* to preclude all ADA claims regarding shiftwork sleep disorder including Scheffler's. However, Scheffler has amply demonstrated through his expert witness, Dr. Monk, that the severity of Scheffler's disorder is not common and that only twenty percent (20%) of the population would suffer the severe symptoms experienced by Scheffler.

The sliding scale standard must be applied to the analysis of shiftwork sleep disorder's interference with a major life activity. The "common ailment" standard is not consistent

with the ADA statutory language and must not be permitted to essentially negate all ADA claims concerning shiftwork sleep disorder.

Shiftwork sleep disorder is similar in many ways to a condition such as H.I.V. wherein the individual is infected with the illness but may not always exhibit symptoms that impair a life function. With shiftwork sleep disorder, if the affected individual is not presently working swingshifts, he may not display characteristics of shiftwork sleep disorder. In this regard, shiftwork sleep disorder has been misunderstood by the courts below and courts in general and it is necessary for this court to review the decisions below and give clear guidelines for courts evaluating less typical disorders.

In *Bragdon v. Abbott*, 524 U.S. 624 (1998) the Supreme Court considered a case in which a woman was diagnosed with H.I.V., but had no symptoms of the condition. The Supreme Court found her to be covered by the ADA, as it protects people without obvious symptoms, just as it covers those who are blind or use wheelchairs. The court sent a strong signal that the ADA was intended to be interpreted broadly. The major life activity that was limited in *Bragdon* was petitioner's ability to have children, as she was essentially infertile due to her fear of passing on the virus to them. Although the plaintiff there was asymptomatic, she was still covered by the ADA. Scheffler, who was symptomatic at the time he was employed by Dow Jones, must logically be deemed a qualified individual with a disability.

B. The Courts Below Applied An Erroneous Standard In Evaluating Whether Scheffler Could Perform The Essential Functions Of His Job As Newscaster/Writer

The court below implicitly held that if the employer says a certain duty is essential to a particular job, then it is so. The court below did not apply an objective standard which is much more appropriate to the analysis of what constitutes an essential function of one's job. Also involved in this issue is the question of an employer's alteration of an employee work schedule as a reasonable accommodation of an employee's disability.

In the present matter, the employer, Dow Jones had an established, written job description for the position of newscaster/writer. The position description did not list the ability to work certain shifts or fluctuating hours as one of the requirements of the newscaster/writer position. Moreover, there were numerous other newscaster/writers employed by Dow Jones under the same job description as Scheffler who were paid on the same pay scale who did not have changing shifts. The courts below accepted Dow's boldface assertion that working swing shifts was an essential function of Scheffler's job. The courts did so without examining the more objective measure of essential functions: the job description. This case will allow this court to address the important issue of the appropriate test for establishing the true essential functions of an individual's job.

C. A Reasonable Accommodation Of An Employee's Disability Can Require That An Employer Alter Work Schedules

This court has not addressed the issue of modified work schedules as a reasonable accommodation to an individual's disability. In *Nelson v. Ryan*, 860 F. Supp. 76 (W.D.N.Y. 1994) the District Court asserted that a reasonable accommodation could include modification of work schedules or "job restructuring." While Dow Jones in the present matter offered an accommodation that altered Scheffler's work schedule, the change in work schedule offered did not take into account the nature and severity of Scheffler's disability and the accommodation this particular individual employee required given the extreme case of shiftwork sleep disorder he displayed.

In *Guice-Mills v. Derwinski*, 967 F.2d 794 (2nd Cir. 1992), the court held that working a particular schedule was an essential function of plaintiff's position as a head nurse. The head nurse position was a quasi-supervisory position and therefore availability at certain hours was essential. However, the court in *Guice-Mills* noted that for a staff nurse position, a non-supervisory job, the shift schedule was not an essential function of the job. The essential duties of a staff nurse were the same for each staff nurse and staff nurses were essentially, "fungible." That is, as long as there were staff nurses assigned to work around the clock, it did not matter which particular nurse was assigned to which shift.

The newscaster/writer position held by Scheffler in the present matter is akin to the staff nurse position, not the head nurse position. Scheffler was one of many newscaster writers whose schedules could have been shifted to accommodate

Scheffler's disability. Moreover, a number of new employees were hired during Scheffler's employment and were offered fixed schedules. In this regard, the employer should have been required to offer the accommodation that was medically indicated: a fixed daytime schedule.

This Court has not had occasion to address the issue of a change in a work schedule as a reasonable accommodation to a disability. Petitioner herein asserts that the appropriate standard would require an employer to reassign a disabled employee to a different shift or working schedule as appropriate to an employee's disability. The opinions of evaluating medical personnel must be more carefully considered. Granting the writ for certiorari in this matter would allow this court to offer guidance to the lower courts as to the appropriate standard for evaluating a work schedule change as a reasonable accommodation of a disability.

II.

COURTS MUST ENGAGE IN MORE MEANINGFUL REVIEW OF A PLAN ADMINISTRATOR'S DENIAL OF BENEFITS WHEN CLEARLY ERRONEOUS AND ARBITRARY

The court below failed to conduct any examination whatsoever of Dow Jones' denial of Scheffler's application for long term disability benefits. Although the arbitrary, capricious and unreasonable standard is deferential, it must not be applied as a "rubber stamp" of an employer's unsupportable denial of long term disability benefits to an employee.

While Dow Jones asserts that the plan document setting forth the terms of Scheffler's LTD benefits plan explains that the employer has discretion to administer the plan, petitioner asserts that plan sponsors/plan administrators must do more than bury the "discretion" section of the plan in the middle or at the end of plan documents. These plan documents are drafted to be read by laypeople and should be clear and unequivocal in their reservation of rights to the plan administrators if the plan administrators wish to retain such discretion. The language used in the relevant portion of the plan document reads:

> The plan committee generally controls and manages the operation and administration of the plan and interprets the plan. Determinations of the plan committee in its discretion and the exercise of the authority conferred on it are final, conclusive and binding on participants. their beneficiaries and all other persons.

This language is near the end of the employee benefits handbook and is not in close proximity to the disability benefits section of the plan. The heading of the section in no way draws the employee's attention to the fact that the plan provides the administrator with discretion to determine eligibility. Moreover the language used is convoluted and unclear and was obviously drafted so that employees would not notice nor recognize that the plan administrators maintained such authority. Because the language regarding discretion is not in close proximity to the long term disability aspects of the plan, and because it is under a section that in no way draws the reader's attention to the fact that the plan administrators have discretion, petitioner submits that a plan administrator must not be permitted to rely on this type of

hidden, convoluted language in a summary plan description to claim it has discretionary authority over eligibility.

While petitioner asserts that the court should review Dow Jones' denial of his long term disability benefits under a de novo standard of review because of the obscurity of the discretionary provisions in the plan, even under the arbitrary, capricious and unreasonable standard, the inequity of the denial of Scheffler's long term disability benefits claim is apparent.

In *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3rd Cir. 1997) the court applied an arbitrary and capricious standard of review and held that the plan administrator had improperly denied Plaintiff Mitchell disability benefits. The court there explained that under the arbitrary and capricious standard the district court may overturn a decision of the plan administrator only if it is without reason, unsupported by the evidence or erroneous as a matter of law.

According to Dow Jones' own disability benefits plan, an employee qualifies for the first twenty-four (24) months of LTD benefits if he/she is unable to do "all" of the duties of his/her regular job. Because Dow Jones asserts that the ability to work swing shifts is an essential function of Scheffler's job, for purposes of long term disability benefits, it must be presumed to be one of the duties of Scheffler's "regular job." The overwhelming medical evidence submitted establishes that Scheffler was unable to work the erratic shifts he had previously worked. This conclusion was reached not just by Scheffler's own physicians, but by Dow Jones' examining physicians. The arbitrary and capricious nature of Dow Jones' denial of Scheffler's long term disability benefits application is apparent: on one hand, Dow

Jones claims Scheffler must be able to work swing shifts as it is an essential duty of his job, but on the other hand Dow Jones is implicitly asserting that he is not disabled from performing the duties of his swing shift job. The court below clearly erred in allowing Dow Jones to get away with this type of "doublespeak."

The court below also erred in holding that Dow Jones could simply rely upon the recommendation of an outside consultant without itself reviewing the consultant's analysis and Dow Jones could escape review of its benefit denial. The law could not possibly contemplate allowing Dow Jones to defer to an outside consultant and avoid any review of its decision by so doing. Plan administrators must have at least some level of accountability to plan participants who should be able to rely upon the plain language contained in the plan description.

The testimony of Dow's outside consultant is further evidence of the arbitrary, capricious and unreasonable nature of the disability benefits denial. Despite the clear and unequivocal language of the plan, Robert O'Neill, disabilities consultant for Mercer, Inc., stated that for the first twenty-four months of an asserted disability, "we felt that the person could work even if its say part-time. We would consider them not totally disabled, and therefore, they would not be qualified under the terms of the LTD plan." This statement makes absolutely no sense given the clear language under the plan. The plan says that to receive benefits, an employee must be unable to perform the duties of his "regular job." In this case, Scheffler worked a full-time job. He was not a part-time employee. Thus, Dow Jones' reliance on an "expert" in interpreting disability plans who applies an analysis completely inconsistent with the actual terms of the plan, is arbitrary, capricious and unreasonable.

Additionally, the arbitrary nature of the LTD benefits denial is apparent because Dow Jones' outside consultant is not a physician and rather than consulting with physicians to determine Scheffler's ability and/or disability to work, O'Neill only consulted with nurses. Moreover, at his deposition, O'Neill stated that he was unable to locate any literature concerning shift-work sleep disorder and he was completely unfamiliar with this condition. Dow Jones' denial of Scheffler's LTD benefits claim is also arbitrary, capricious and unreasonable because at no time did it ever review the March 10, 1995 report of Dr. Papo. The report existed at the time Dow Jones made its denial determination, but Mercer never gave it to Dow and Dow never asked for it. Thus, Dow made a determination to deny Scheffler's application based on a relevant report it knew existed, but never reviewed.

According to Webster's New World Dictionary, Third College Edition, "arbitrary" is defined as "not fixed by rules but left to one's judgment or choice, discretionary, based on one's preference, notion, whim, etc., capricious, absolute, despotic." The same dictionary defines "capricious" as "subject to caprices, tending to change abruptly and without apparent reason, erratic, flighty." Dow and its so-called consultants, managers and final decisionmakers all "arbitrarily and capriciously" ignored, or purposely avoided making reference to the definition of disability, which should have controlled Scheffler's eligibility for the insurance coverage.

The definition that should have been applied is found in the Dow Jones benefits handbook and reads:

> To receive LTD benefits you must be considered "totally disabled" which means that during the first twenty-four months of LTD benefits, you are unable to perform all the duties of your regular job.

This is a "job specific" definition and in order to make a judgment using this standard, one must consider what "all" the duties of the job are. Significantly, that definition states "all" duties and not just essential duties.

The record illustrates that throughout the entire decisionmaking process, none of the decisionmakers bothered to find out what Scheffler's job duties were. While the arbitrary and capricious standard may be deferential, it can not insulate plan administrators from any review whatsoever of their disability benefits decisions. Here, Dow never examined relevant medical evidence, relied on the opinions of individuals who admittedly knew nothing about petitioner's disorder and who clearly had no knowledge whatsoever of the terms of Dow's LTD plan which refers to "regular job." Plan administrators must not be permitted to use a referral to a claims review service as a means to insulate themselves from any effective review of their decisions denying LTD benefits to employees. Employees must be able to rely upon the plain language contained in the plan documents they receive. There is nothing anywhere in the plan document given to Scheffler which would in any way indicate that one is not disabled if he can work a part-time job although he used to work a full-time one. Plan administrators must have some accountability to the participants in the plan.

CONCLUSION

Shiftwork sleep disorder is a real illness that can cause severe symptoms for some sufferers. It can be disabling in certain circumstances. Given the severity of Petitioner's shiftwork sleep disorder, he should have been provided protection from discriminatory termination of his employment under the American's with Disabilities Act. This court should grant certiorari to review the lower courts' failure to adequately consider this misunderstood ailment and the appropriateness of requiring employers to offer reasonable accommodations to employees who experience the illness.

This Court should also grant certification in this matter to provide some meaningful analysis to guide lower courts in examining the arbitrary, capricious and unreasonable denial of benefits to benefits plan participants who should be able to rely upon the plain language set forth in their plan documents. Moreover, this court should grant certification to issue standards to be followed in drafting plan documents such that any provisions granting the plan administrators discretion should be conspicuously and clearly placed. For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JUNE 17, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6060

WILLIAM SCHEFFLER,

Appellant

v.

DOW JONES & COMPANY

Appellee

Appeal from the United States District Court
for the District of New Jersey
(Civil No. 96-cv-3786)
District Judge: Honorable Dickinson R. Debevoise

Argued May 20, 1999
Before: BECKER, *Chief Judge*, RENDELL and
GARTH *Circuit Judges*

(Filed June 17, 1999)

* * *

MEMORANDUM OPINION

Appendix A

RENDELL, Circuit Judge.

Appellant appeals from the District Court's grant of summary judgment and asserts two grounds of error. First, he claims that the District Court erred by determining that he was not a qualified individual with a disability, and that he was not entitled to reasonable accommodation under the ADA. Second, he argues that the District Court erred in its determination that the denial of long term disability benefits was not arbitrary or capricious. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary. *See Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 126 (3d Cir. 1998).

In 1991, Scheffler was hired by the Wall Street Journal Radio Report in New York City. At the time he was hired, Scheffler was told that he would be required to fill-in for other newscasters when they were on vacation or otherwise unavailable. At that point in time, the WSJRR was not broadcasting twenty four hours a day. In 1992, the Wall Street Journal Radio Report added overnight programming, and Scheffler began to work a variety of nighttime shifts. Between 1993 and 1994, he began experiencing a variety of health problems that he attributed to the many shifts in his work schedule. He was diagnosed with "shift-work sleep disorder," and Dow Jones recommended that he take time off from work to address his medical problems.

Scheffler took several weeks vacation, and upon his return to work, refused to work a 5 a.m. to 12 p.m. shift, and the schedules of other newscasters were shifted to accommodate his physical needs. Scheffler continued to have problems with the rigors of his schedule and applied for short

term disability benefits. While he was on leave, Dow Jones assigned him to a set of seven hour shifts between the hours of 10 a.m. and 11 p.m., with the same seven hour shift for a minimum of one week. The revised schedule was reviewed by Dr. Papo, who had seen Scheffler on an earlier date at Dow Jones' request, and Dr. Papo approved the new schedule for Scheffler.

Dow Jones then requested that Scheffler return to work; he refused and then applied for long term disability benefits. Dow Jones denied his request for long term disability benefits, and he was terminated for absence without leave effective December 31, 1995. Scheffler then appealed the denial of long-term disability benefits, which was denied, and he submitted a grievance pursuant to a collective bargaining agreement, which was also unsuccessful. Scheffler then filed the instant suit.

At the conclusion of discovery, Dow Jones moved for summary judgment, which the District Court granted. The District Court reasoned that even if Scheffler could be considered disabled under the ADA, he could not establish a case of prima facie discrimination under the statute, because he could not demonstrate that he was otherwise qualified to perform the essential functions of the job with or without reasonable accommodation from his employer. *See Shiring v. Runyon*, 90 F.3d 827, 831 (3d Cir. 1996); *McDonald v. Pennsylvania Dept. of Pub. Welfare*, 62 F.3d 92, 95-97 (3d Cir. 1995). We agree with the District Court's analysis of this aspect of appellant's argument:

> Although [Scheffler] disputes Dow Jones' claim that he was hired as a swingman, Plaintiff

> acknowledges that he was hired, at least in part, to serve as a fill-in announcer for other newscasters at WSJRR. This would necessarily imply, and did in fact require, his availability to work a variety of hours and a flexible schedule. . . . There is no contention that Plaintiff was hired to work a steady shift. Rather it is apparent that during his years at WSJRR he was required to work varying shifts. As he himself put it, "[a]fter two-and-a-half years of sharp and wide schedule shifts I've gotten to the point where my health is being damaged *by the swings*." (Wilck Cert., Ex. H) (emphasis added). Thus, Plaintiff was no longer able to perform an essential aspect of the job he was hired to do because, as he concedes, he could not work certain shifts due to his sleep disorder.

Opinion at 18.

The District Court also noted the weaknesses in appellant's argument regarding his employer's duty to accommodate his disability:

> [A]s Plaintiff notes, the law may require in certain circumstances that an employer accommodate a disability by modifying an employee's work schedule, Plaintiff cites no authority which mandates that the employer is required to revamp the work schedule when to do so would in essence change the very nature of the job for which the employee was hired. Moreover, the ADA does not require that Dow Jones create a new position

> for Plaintiff, but merely provide reasonable accommodation so that he could perform his job. The Act does not dictate that a night watchman be given a position on the dayshift, nor does it require that an employee such as Plaintiff be provided with a fixed daytime shift when he was hired to work varying shifts.

Opinion at 20.

The District Court next reviewed the second point raised by appellant, namely, his entitlement to disability benefits under the company's plan. Noting that the plan gave discretion to the Plan Committee to interpret the plan, the District Court noted the narrow scope of review in such a situation, and concluded that neither the committee's use of an outside consultant's recommendation nor its denial of long term disability benefits was arbitrary or capricious. Opinion at 21-24. We find no error in the District Court's discussions or analysis of these issues. We will affirm on the basis of the reasons and analysis set forth in the District Court opinion and adopt those reasons and analysis as our own.

For the foregoing reasons, we will affirm.

TO THE CLERK:

Please file the foregoing memorandum opinion.

s/ [illegible]
Circuit Judge

DATED: June 17, 1999

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-6060

WILLIAM SCHEFFLER,

Appellant

v.

DOW JONES & COMPANY

Appellee

Appeal from the United States District Court
for the District of New Jersey
(Civil No. 96-cv-3786)
District Judge: Honorable Dickinson R. Debevoise

Argued May 20, 1999
Before: BECKER, *Chief Judge*, RENDELL
and GARTH *Circuit Judges*

JUDGMENT

This case came to be heard on the record from the United States District Court for the District of New Jersey and was argued on May 20, 1999. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered April 15, 1998 be

and the same is hereby affirmed. All of the above in accordance with the opinion of this Court. Costs taxed against the appellant.

ATTEST:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: June 17, 1999

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED APRIL 15, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-3786 (DRD)

WILLIAM R. SCHEFFLER,

Plaintiff,

v.

DOW JONES & COMPANY,

Defendant.

OPINION

* * *

DEBEVOISE, Senior District Judge.

Plaintiff William R. Scheffler ("Plaintiff") instituted this action against his former employer, Defendant Dow Jones & Company ("Dow Jones" or "Defendant"), alleging, *inter alia*, violations of the Americans with Disabilities Act ("ADA"), the New Jersey Law Against Discrimination ("NJLAD"), and the New York State Human Rights Law ("NYSHRL"). Plaintiff maintains that Defendant failed to accommodate his alleged disability, shift-work sleep

disorder. He also asserts a claim based on Defendant's denial of his application for long-term disability benefits.

Now before the Court is Defendant's motion for summary judgment. For the reasons set forth below, the motion will be granted.

BACKGROUND

In 1991, Defendant hired Plaintiff as a "Newscaster/ Writer" at Wall Street Journal Radio Report ("WSJRR") in New York City, a radio affiliate of Dow Jones. At the time he was hired to work at WSJRR, Plaintiff was advised that he would be required to fill-in for other newscasters when they were on vacation or otherwise unavailable.[1] Announcements to the DowPhone staff, Plaintiff's former Department at Dow Jones, stated that Plaintiff was moving on to join WSJRR in New York as a fill-in announcer.[2]

At the time Plaintiff commenced his employment with Dow Jones, WSJRR was not broadcasting twenty-four hours

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1. As discussed *infra*, Dow Jones maintains that Plaintiff was hired as a "Swingman" and thus, working varying shifts was an essential aspect of his job. Meanwhile, Plaintiff disputes that he was told during his job interview that he was being hired as a swingman, although he acknowledges that he was advised that he would be asked to fill-in for other announcers at times. Plaintiff asserts that he was told that his usual shift would be from 10:30 a.m. to 5:30 p.m.

2. Plaintiff had previously worked as a fill-in announcer at another radio station, WPAT, where he also worked varying shifts. (Wilck Cert., Ex. E, Deposition of Plaintiff, at 26:2 - 13).

each day. In 1992, WSJRR added overnight programing to its programing schedule. Consequently, Plaintiff was required to work periodic overnight shifts.

During 1993 and 1994, Plaintiff began experiencing health problems due to what he described as an erratic work schedule. In April 21 1994, Plaintiff expressed his displeasure with regard to his schedule and concern over the toll the varying hours were taking on his health.[3] (Wilck Cert., Ex. H). He stated, in pertinent part:

> I AM CURRENTLY FACING A SITUATION THAT I THINK YOU MIGHT WANT TO KNOW ABOUT. *AFTER TWO-AND-A-HALF YEARS OF SHARP AND WIDE SCHEDULE SHIFTS I'VE GOTTEN TO THE POINT WHERE MY HEALTH IS BEING DAMAGED BY THE SWINGS.* I'VE HAD A NUMBER OF PROBLEMS CAUSED BY THIS INCLUDING COMING DANGEROUSLY CLOSE TO FALLING ASLEEP AT THE WHEEL WHILE DRIVING HOME FROM WORK ON A NUMBER OF OCCASIONS. AND A FEW DAYS AFTER SWITCHING FROM GOING TO BED AT 2-AM [sic] FOR A WEEK, TO GETTING UP AT 1:30 AM FOR A WEEK WITH ONLY A SATURDAY NIGHT IN BETWEEN, I HAD THE WORST ENCOUNTER WITH A

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3. Specifically, Plaintiff maintains that he suffered from headaches, lack of concentration, memory loss, exhaustion, and gastrointestinal problems.

Appendix B

VIRAL INFECTION IN NEARLY 30-YEARS. AFTER SPENDING A WEEK IN BED, IT WAS OBVIOUS TO ME THAT MY IMMUNE SYSTEM WAS NO LONGER UP TO SPEED. AND JUST LAST WEEK, BECAUSE OF MY WORK SCHEDULE I WAS GOING TO BED AT 7-AM, AND THIS PAST MONDAY AND TUESDAY I HAD TO GET UP FOR WORK AT 6-AM, AND HERE ON THURSDAY AND FRIDAY I'M FINISHING WORK AT 9:30-PM. THIS WEDNESDAY MY BLOOD PRESSURE WAS TOO HIGH. ON WEDNESDAY, I WENT TO ROBERT WOOD JOHNSON UNIVERSITY HOSPITAL AND HAD AN EVALUATION BY A MEDICAL SPECIALIST IN SHIFT CHANGE PROBLEMS. THE ATTACHED LETTER SHOULD EXPLAIN WHAT HE FOUND. THE REACTION FROM THE RADIO DEPARTMENT WAS IMMEDIATE, AND AMONG OTHER THINGS, WENT SOMETHING LIKE — IF YOU'RE NOT DOING THE SWING SHIFTS THERE'S NO PLACE FOR YOU HERE. NO JOB IS WORTH SACRIFICING YOUR HEALTH, SO ALL THINGS CONSIDERED I'M LOOKING TO MOVE ALONG AS SOON AS POSSIBLE . . .

(*Id.*) (emphasis added).

On April 20, 1994, Dr. Matthew Menza, of the Sleep Disorders Center at Robert Wood Johnson Hospital, examined Plaintiff. Dr. Menza diagnosed Plaintiff as

suffering from "shift-work sleep disorder." (Wilck Cert., Ex. J). Plaintiff's symptoms included chronic tiredness, headache, irritability, and stomach pain. (*Id.*). Dr. Menza suggested that Plaintiff "would be much more productive if there were more regularity to his work schedule." (*Id.*). After receiving Dr. Menza's evaluation and recommendation, Dow Jones suggested that Plaintiff take vacation time to address his health problems. Plaintiff took several weeks vacation. (Wilck Cert., Ex. E, Plaintiff's Dep. Tr. at 81:10 - 15; 82:12 - 14).

When he returned to work in May 1994, Plaintiff refused to work a scheduled 5 a.m. to 12 p.m. shift, citing his sleep disorder. The shifts of other newscasters/writers were juggled in order to accommodate Plaintiff. (Wilck Cert., Ex. K). Plaintiff was given a 10 a.m. to 5 p.m. shift in order to reduce the fluctuation in his hours from the prior week and the week that was to follow. (*Id.*) Plaintiff was told that he would be considered for a steady shift in the event that one became available. (Wilck Cert., Ex. L). Meanwhile, he inquired about returning to his old Department at Dow Jones. (Wilck Cert., Ex. E., Plaintiff's Dep. Tr., 90:10 - 91:4).

Plaintiff was unable to meet the demands of his revised work schedule. On February 27, 1995, he applied for short-term disability benefits and ceased working. (*Id.* at 75:10 - 19). On Plaintiff's disability application, his general physician, Dr. Brian Moore, stated that Plaintiff was unable to work because of his sleep disorder, hypertension and other related problems. (Wilck Cert., Ex. N). Dr. Moore also stated that Plaintiff could return to work as of May 1, 1995. (*Id.*) On March 10, 1995, Plaintiff met with Dr. Michael Papo at

the request of Dow Jones.[4] Dr. Papo made the following diagnosis:

> It is my opinion that [Plaintiff] is suffering from fairly Severe Desynchronization of Internal Circadian Rhythm from the external environment, brought up by his frequent work shift changes, resulting in total sleep deprivation, hypertension, dysautonomia, adrenal overactivity, and impaired motor function . . . [The] transient disturbance in autonomic tone predisposes the heart to increased electrical vulnerability triggering the genesis of sudden death brought on by ventricular fibrillation . . . Prompt therapeutic measures in reducing the unbalanced sympathetic tone to the heart and peripheral blood vessels, in order to prevent ventricular fibrillation and sudden cardiac death. Long term therapy with Captopril and Nitrendipine being drugs of choice in controlling high blood pressure of circadian disturbance origin . . . Time off work, to give a change to circadian rhythm to recover . . . *After recovery and return to work plaintiff should be given fixed working shifts.* Time for recovery may take 4-6 weeks. *He should be permitted to return to work only after his blood pressure returns to normal and sleep disturbances have disappeared.*

(Wilck Cert., Ex O) (emphasis added).

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4. Plaintiff also met with two other physicians at the request of Dow Jones while he was on disability leave.

Appendix B

While Plaintiff was out of work on short-term disability leave, Dow Jones again revised his schedule so that he would only be required to work seven hour shifts between the hours of 10 a.m. and 11 p.m., (e.g. 10 a.m. to 5 p.m. or 12 p.m. to 7 p.m.), with the same seven hour shift for a minimum of one week. Plaintiff would receive weekends off between shifts and late night and early morning shifts were removed from his schedule. At the request of the Dow Jones' Personnel Department, Dr. Papo reviewed the proposed schedule. Dr. Papo gave the following assessment in a May 4, 1995 letter to Dow Jones, which stated, in relevant part:

> Based upon my careful review of the memo that outlines [Plaintiff's] schedule from May to December of this year, it is my assessment that [Plaintiff] may resume his normal job functions, based upon the schedule that was presented to me, without limitations or restrictions effective immediately if he has not already done so. When I examined [Plaintiff] on March 10, 1995 I advised him that his recovery time should be within 4-6 weeks of the day that I examined him. Therefore, [Plaintiff] should have returned on April 14, 1995 at the very latest . . .

(Wilck Cert., Ex. R, Kanef Cert., Ex. B). Dr. Papo did not reexamine Plaintiff before or after making this determination.[5]

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5. The revised schedule was also reviewed by Dr. Michael J. Thorpy, offered by Defendant as an expert in sleep disorders. He (Cont'd)

Appendix B

In May 1995, Dow Jones requested that Plaintiff return to work based on Dr. Papo's recommendation. Plaintiff refused to do so, rejecting the revised schedule out-of-hand.[6] In September 1995, Plaintiff applied for long-term disability benefits. To receive long-term disability an employee must be "totally disabled", which is defined by Dow Jones' Benefits Plan as follows:

> To receive LTD benefits you must be considered 'totally disabled,' which means that: *during the first 24 months of LTD benefits you are unable to do all the duties of your regular job*, and [a]fter 24 months of LTD benefits, your disability prevents you from doing any gainful work for which you are reasonably qualified by training, education or experience.

(Wilck Cert, Ex. U at 70) (emphasis added).

Long-term disability provides 60% base salary at the time that the employee becomes eligible, which continues

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(Cont'd)
also concluded that Plaintiff could work the schedule and that it was a reasonable accommodation for Plaintiff's condition. Meanwhile, Plaintiff challenges Dr. Thorpy's qualification as an expert on shift-work sleep disorders and notes that his own expert, Dr. Timothy Monk, examined the schedule and found that it was insufficient.

6. Plaintiff maintains that the revised schedule was substantially similar to that which he worked before applying for short-term disability.

for as long as the employee remains totally disabled, but not past the end of the maximum benefit period, which in Plaintiff's case would be at age 65. The Plan grants the Plan Administrator discretion to interpret and administer its terms. (*Id.*). It states, in relevant part:

> The plan committee generally controls and manages the operation and administration of the plan and interprets plan . . . *[d]eterminations of the plan committee in its discretion and the exercise of the authority conferred on it are final, conclusive and binding on participants, their beneficiaries and all other persons.*"

(*Id.* at 151).

On his application for long-term disability benefits, Plaintiff stated that he was unable to work as of February 27, 1995. (Wilck Cert., Ex. V). He submitted a report of his general physician, Dr. Moore, along with the application. Dr. Moore's report noted that Plaintiff's condition required that he work only during regular daytime hours and in a less stressful work environment. (Wilck Cert., Ex. W).

Plaintiff's long-term disability application and related documents were sent to William H. Mercer, Inc. ("Mercer"), an outside company hired by Dow Jones to review such applications. With the assistance of a health care professional, a disability consultant reviewed Plaintiff's application and the reports of Plaintiff's personal physician and the physicians that examined him at the request of Dow Jones. Mercer recommended that the application be denied

because Plaintiff did not qualify as totally disabled. (Wilck Cert., Ex. AA). Thereafter, Dow Jones denied Plaintiff's claim.

After the denial of his application for long-term disability benefits, Plaintiff was informed in writing of the aforementioned revised schedule and was notified that he must return to work. Plaintiff again refused to return to work. He stated his reasons for doing so in a December 28, 1995 letter to his supervisor:

> I just want to make it clear to you why I cannot return to work until adequate accommodations are made for my disabilities. The range of hours work schedule contained in your December 15 letter is similar to the proposed schedule that you prepared last Spring . . . If I couldn't work that, I can't work your latest proposed schedule because they are essentially the same and no additional accommodation has been made. I also want to remind you that I was placed on disability last February for three reasons . . . sleep disorder, high blood pressure and a problem with my heart beat. The doctors blame all three problems on work related stress, and under federal law employers are required to make accommodations for the resulting disabilities. A fixed daytime schedule might minimize the risk of sleep disorder problems. But accommodating the high blood pressure problem will likely require a substantial reduction in workload and related deadline-pressure. To give you an idea what the government may require. Back in September,

> when I filed the charges against Dow Jones under the Americans with Disabilities Act, one of the officers at the EEOC suggested that an acceptable accommodation might be to have Dow Jones assign a newswriter to work exclusively with me on preparing my newscasts. That would reduce my workload and allow me the necessary flexibility to manage work related stress and deadline time pressure. That was just one suggestion based on his experience in other cases, but it should give you some idea of the kind of accommodation the government is looking for.

(Wilck Cert., Ex. II). By letter dated December 26, 1995, Plaintiff was notified that his employment was being terminated for absence without leave, effective December 31, 1995. (Wilck Cert., Ex. CC).

Plaintiff appealed the denial of long-term disability benefits. His application was again sent to Mercer and was reviewed by a different member of the medical staff. Mercer again concluded that Plaintiff was not totally disabled and recommended that the application be denied. Plaintiff's appeal was reviewed by the Plan Committee in August 1996. The Plan Committee again concluded that Plaintiff was not totally disabled and denied his appeal. (Wilck Cert., Ex. FF).

Pursuant to a collective bargaining agreement, Plaintiff, through his union, submitted a grievance relating to his termination. Following a full hearing in which Plaintiff was represented by counsel, the Arbitrator concluded that: 1) Plaintiff was not disabled under the ADA; 2) nonetheless, Dow Jones had offered reasonable accommodations; and 3)

Dow Jones had just and sufficient cause to terminate Plaintiff's employment. (Wilck Cert., Ex. GG). Thereafter, Plaintiff instituted this action against Dow Jones, alleging, *inter alia*, disability discrimination in violation of the ADA, as well as under New York and New Jersey law.

Dow Jones now moves for summary judgment. It argues that Plaintiff's disability discrimination claims must be dismissed because: 1) Plaintiff is not disabled; 2) Plaintiff could not perform the essential functions of his job with reasonable accommodation; and 3) it provided a reasonable accommodation for Plaintiff's shift-work sleep disorder. In addition, Dow Jones contends that Plaintiff's claim under the NJLAD must be dismissed because New Jersey law does not apply. With regard to the additional claims asserted by Plaintiff, Dow Jones maintains that: 1) the claim for long term disability benefits must be dismissed because the decision to deny said benefits was not arbitrary or capricious; 2) the claim for punitive damages is unwarranted; and 3) the alleged ERISA violation and prayer for reinstatement asserted by Plaintiff for the first time in the Final Pretrial Order are improper.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986), *rev'g*, 723 F.2d 238 (3d Cir. 1983). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Sound Ship Bldg. Corp. v. Bethlehem Steel Co.*, 533 F.2d 96, 99 (3d Cir.), *cert. denied*, 429 U.S. 860 (1976).

At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The mere existence of some alleged factual dispute between the parties, however, will not defeat an otherwise properly supported motion for summary judgment. *Id.* at 247-248.

DISCUSSION

I. *Plaintiff's Claims of Disability Discrimination*

A. *Plaintiff's Claim under the NJLAD*

As an initial matter, Plaintiff's claim under the NJLAD must be dismissed. The underlying events in question took place in New York, and the only connection between the disability discrimination charge and New Jersey is the mere fact that Plaintiff is a resident of New Jersey. The law of the state of employment, rather than that of the state where a

plaintiff resides, governs employment actions. *See Shamley v. ITT Corp.*, 869 F.2d 167, 171-72 (2d Cir. 1989); *D'Agostino v. Johnson & Johnson, Inc.*, 133 N.J. 516, 539 (1993). Plaintiff offers no argument in opposition to this aspect of Defendant's motion and thus fails to provide the Court with any basis for finding that Dow Jones is subject to the NJLAD. Therefore, as a preliminary matter, Dow Jones' motion for summary judgment will be granted with respect to the NJLAD claim.

B. *The ADA Claim*

The ADA provides, in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

The ADA defines "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Major life activities include, but are not limited to, "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and *working*." 29 C.F.R. § 1630.2(i) (emphasis added). These activities are "substantially limit[ed]" when one is:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).

In determining whether Plaintiff suffers from a disability which falls within the purview of the ADA, the court must consider several factors including:

> (i) The nature and severity of the impairment;
>
> (ii) The duration and expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2). The court's task is "to determine if a person who claims a disability under the ADA is 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' " *Olson v. General Electric Astrospace*, 101 F.3d 947, 952 (3d Cir. 1996) (quoting 29 C.F.R. § 1630.2(j)(3)(i)). "An 'inability to perform a single particular job does not constitute a substantial limitation in the major life activity of working.' " *Id.*

The elementary issue with regard to Plaintiff's ADA claim is whether his alleged shift-work sleep disorder qualifies as a disability for purposes of the Act. Dow Jones argues that Plaintiff's alleged shift-work sleep disorder does not qualify as a disability for purposes of the ADA, relying on *Olson*, 101 F.3d 947, *Mackie v. Runyon*, 804 F. Supp. 1508 (M.D.Fla. 1992), and *Williams v. City of Charlotte, N.C.*, 899 F. Supp. 1484 (W.D.N.C. 1995). Plaintiff disputes that these cases preclude a finding that shift-work sleep disorder is a disability which falls within the protection of the Act.

In *Olson*, the Court of Appeals upheld the District Court's finding that Olson, who claimed, among other things, that he suffered from a sleep disorder, could not demonstrate that he suffered from a disability within the meaning of the ADA.[7] In reaching that conclusion, however, the Court did not hold, nor intimate that such a disorder does not qualify

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7. Olson alleged that he suffered from depression and multiple personality disorder in addition to his sleep disorder. *Id.* at 950.

as a disability under the ADA. The Court merely affirmed the District Court's finding that Olson could not demonstrate that he was disabled.[8] *Id.* at 953.

Meanwhile, in *Mackie*, the District Court for the Middle District of Florida concluded that Mackie's bipolar disorder, which allegedly prevented her from working the night shift, did not qualify as a handicap under the Rehabilitation Act because Mackie could stabilize her condition with medication, and since she could work the daytime shift without adverse effects from her mental illness.[9] *Id.* at 1511. While Plaintiff maintains that *Mackie* is distinguishable because it involved a different type of disorder, the Court's reasoning, by way of analogy, could be applied here. Of course, the decision is not binding authority and more importantly, it does not stand for the broad proposition that a sleep disorder can never qualify as a disability for purposes of the ADA. The District Court for the Western District of North Carolina in *Williams*, however, did so hold. The *Williams* Court concluded that Williams' alleged disability, a sleep disorder, was "nothing more than a commonplace condition which does not precipitate any particular

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8. The Court of Appeals did find, however, that Olson raised a genuine issue whether his employer regarded him as disabled. *Id.* at 953-54.

9. In addition, the Court found that even if Mackie's mental illness constituted a handicap within the purview of the Rehabilitation Act, she could not sustain her claim because she was not able to show that she could perform the essential functions of the job for which she was hired, with or without reasonable accommodation. *Id.* at 1511.

disadvantage" and therefore, was "not an impairment which qualifies as a 'disability' under the [ADA]."[10] *Williams*, 899 F. Supp. at 1488.

Plaintiff argues that there is evidence in the record, namely the testimony of his shift-work sleep disorder expert, Dr. Monk, which negates the conclusion that such a disorder is commonplace. Indeed, the severity of the health problems from which Plaintiff suffers, which are allegedly a direct result of his work schedule and sleep disorder, raises the question whether such a disorder is too commonplace to ever qualify as a disability for purposes of the ADA.

Sleep disorders would seem to be a common infirmity of night shift workers. Moreover, such a disorder is undoubtedly a natural consequence of the work schedule, rather than a permanent physical impairment. As Plaintiff maintains, to change the work schedule would effectively eliminate the disorder. Nevertheless, the question whether shift-work sleep disorder is a disability for purposes of the ADA need not be resolved here. As in *Olson*, the record is sufficient to at least raise the issue whether his employer regarded him as disabled, as Dow Jones concedes that it took steps to accommodate his condition. However, even if Plaintiff could qualify as a person with a disability because

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10. Williams was a police officer who worked the 9:45 p.m. to 6:00 a.m. shift. She was diagnosed as having a sleep disorder and her physician recommended that Williams cease working the night shift. The request for a shift change was denied and Williams was told that she would need a colleague to voluntarily switch shifts to remedy the situation.

his employer regarded him as such, his ADA claim must still fail.

To establish a prima facie case of disability discrimination, a plaintiff must show:

(1) that he or she has a disability;

(2) that he or she is *otherwise qualified to perform the essential functions of the job*, with or without reasonable accommodations by the employer; and

(3) that he or she was nonetheless terminated or otherwise prevented from performing the job.

Shiring v. Runyon, 90 F.3d 827, 831 (3d Cir. 1996). Thus, to survive summary judgment Plaintiff must demonstrate that he is able to perform the essential functions of his job with or without reasonable accommodation from his employer. 29 C.F.R. § 1614.203(a)(6); *see Shiring*, 90 F.3d at 831; *McDonald v. Commonwealth of Pennsylvania*, 62 F.3d 92, 96 (3d Cir. 1995).

Dow Jones maintains that it is entitled to summary judgment because Plaintiff was unable to work the swing shifts which were an essential part of his job. Plaintiff argues that the record raises a genuine issue whether working overnight shifts was so essential. He relies on the fact that he was hired as a newscaster/writer, rather than a swingman, and notes that a description of the latter position is not contained anywhere in the book of job descriptions prepared

by Dow Jones. In addition, Plaintiff refutes Dow Jones' assertion that he was aware of the term swingman because it is prevalent in the industry and because he held such a position with a different station earlier in his career. Moreover, he notes that when he was hired, WSJRR did not have an overnight format and thus, working overnight shifts was not part of the job for which he was hired.

The foregoing does not change the undisputed fact that Plaintiff was hired to cover for other newscasters. Although he disputes Dow Jones' claim that he was hired as a swingman, Plaintiff acknowledges that he was hired, at least in part, to serve as a fill-in announcer for other newscasters at WSJRR.[11] This would necessarily imply, and did in fact require, his availability to work a variety of hours and a flexible schedule.

There is no contention that Plaintiff was hired to work a steady shift. Rather, it is apparent that during his years at WSJRR he was required to work varying shifts. As he himself put it, "[a]fter two-and-a-half years of sharp and wide schedule shifts I've gotten to the point where my health is being damaged *by the swings*." (Wilck Cert., Ex. H) (emphasis added). Thus, Plaintiff was no longer able to perform an essential aspect of the job he was hired to do because, as he concedes, he could not work certain shifts due to his sleep disorder. Accordingly, Plaintiff is not entitled to redress under the ADA for Dow Jones' alleged failure to

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11. Moreover, while he maintains that he was advised that generally his hours would be between 10:30 a.m. and 5:30 p.m., Plaintiff does not allege that he was told he would work a particular shift.

adequately accommodate his condition. Therefore, Dow Jones' motion for summary judgment will be granted with respect to his ADA claim.[12]

Plaintiff argues that what would constitute reasonable accommodation in his case is in dispute and is for the jury to decide. Although the issue need not be reached, Plaintiff's own statements which are contained in the record undermine his position that reasonable accommodation could have been provided for his condition without essentially removing the albeit demanding requirements of a position as a newscaster. Plaintiff advised his supervisor that the "fixed daytime schedule might minimize the risk of sleep disorder problems" but that "accommodating [his] high blood pressure problem will likely require a substantial reduction in workload and related deadline-pressure." (Wilck Cert., II). He suggested a reduced workload and deadline time-pressure, and that Dow Jones assign a newswriter to work exclusively with him on

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12. Dow Jones also bases its motion on the arbitrator's findings that Plaintiff did not have a disability within the meaning of the ADA and that Plaintiff was not discriminated against because Dow Jones offered reasonable accommodation. While the arbitrator's ruling may be considered by the court, it is not preclusive and thus, is not an independent ground for summary judgment on Plaintiff's discrimination claims. *See Jalil v. Avdel Corp.*, 873 F.2d 701, 706 n.5 (3d Cir. 1989) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)), *cert. denied*, 493 U.S. 1023 (1990). In addition, Dow Jones' argument that Plaintiff should be estopped from asserting that he is able to work with reasonable accommodation is without merit. Dow Jones bases this argument on the fact that Plaintiff applied for Social Security benefits, in addition to long-term disability. It is undisputed, however, that the company policy required that Plaintiff do so.

preparing his newscasts. (*Id.*) While he has apparently abandoned such demands, his own statements raise serious doubt whether he would be able to perform his duties even if the fixed daytime schedule would have been provided.

While, as Plaintiff notes, the law may require in certain circumstances that an employer accommodate a disability by modifying an employee's work schedule, Plaintiff cites no authority which mandates that the employer is required to revamp the work schedule when to do so would in essence change the very nature of the job for which the employee was hired. Moreover, the ADA does not require that Dow Jones create a new position for Plaintiff, but merely provide reasonable accommodation so that he could perform his job. The Act does not dictate that a night watchman be given a position on the dayshift, nor does it require that an employee such as Plaintiff be provided with a fixed daytime shift when he was hired to work varying shifts.

C. *Plaintiff's Discrimination Claim under New York Law*

Under New York law as in effect at the time relevant to this case, Plaintiff was entitled to protection for "disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in a job or occupation sought or held." N.Y. Exec. Law § 292(21) (McKinney 1997). Thus, unlike under the ADA, New York law did not require that Dow Jones offer Plaintiff reasonable accommodation.[13] *See Hendler v. Intelecom U.S.A., Inc.*, 963

13. The NYSHRL was amended, effective January 1, 1998, and now requires that reasonable accommodation be provided by

(Cont'd)

F. Supp. 200, 211 (E.D.N.Y. 1997). As I have already found that Plaintiff was unable to perform an essential function of his job, his claim under the NYSHRL must also be dismissed.

II. *Plaintiff's Claim Based on the Denial of His Application for Long Term Disability Benefits*

Plaintiff has asserted a claim based on the Defendant's denial of his application for long-term disability benefits. He argues that this Court should review said denial *de novo*. The Plan in question affords the Plan Administrator discretion to interpret and administer the Plan.[14] Therefore, the denial of Plaintiff's application for employment benefits is reviewed under an arbitrary and capricious standard. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433, 437-39 (3d Cir. 1997); *Abnathya v. Hoffman-La Roche, Inc.*, 2 F.3d 40, 41 (3d Cir. 1993).

"Under the arbitrary and capricious standard, the court must defer to the administrator of an employee benefit plan

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(Cont'd)
an employer for a disabled employee. Plaintiff argues that the amendment merely illustrates that the law was unclear at the time of the alleged violation. To the contrary, the change in the law confirms that prior to January 1, 1998, and at all times relevant to this case, New York did not require reasonable accommodation.

14. Plaintiff argues that the Plan does not clearly provide that the Plan Administrator has discretion regarding the determination of eligibility. As previously noted, the plain language of the Plan affords the Plan Administrator general discretion in administering the Plan.

unless the administrator's decision is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan." *Abnathya*, 2 F.3d at 41. "The district court may overturn a decision of a Plan administrator only if it is 'without reason, unsupported by the evidence or erroneous as a matter of law.' " *Mitchell*, 113 F.3d at 439 (quoting *Abnathya*, 2 F.3d at 45). Thus, the scope of the court's review is narrow and it is not permitted to substitute its own judgment for that of the plan administrator. *Id.* Moreover, the court may only consider the evidence which was before the plan administrator. *Abnathya*, 2 F.3d at 48 n.8.

Dow Jones relied on the recommendation of Mercer, an outside consulting firm hired to evaluate Plaintiff's long-term disability claim. Mercer concluded that the claim be denied because of "an absence of definitive LTD physical or mental disorder and no objective medical evidence to support the claim for total disability." (Wilck Cert., Ex. AA at 2). Plaintiff argues that Dow Jones' reliance on an outside consultant was arbitrary and capricious. Perhaps if it were shown that Dow Jones merely followed the recommendation without giving it any independent consideration, then Plaintiff's argument might be persuasive. Here, however, the Plan Committee reviewed the report and recommendation. Moreover, seeking advice from those who are recognized as having expertise in a particular area may actually curtail a finding of arbitrariness.

Plaintiff also argues that it would be inconsistent to hold that Dow Jones' denial of long-term disability benefits was not arbitrary and capricious based on a finding that Plaintiff

was not totally disabled under the Plan, as Dow Jones also maintains that he was unable to perform an essential function of his job.[15] It does not necessary follow, however, that the denial was arbitrary and capricious simply because Plaintiff, at the time he requested a fixed daytime schedule, was unable to perform an essential function of his job.

Among the information relied on by Mercer was the diagnosis of Dr. Papo. Dr. Papo concluded that Plaintiff needed approximately four to six weeks to recover from his sleep disorder and related health problems. Mercer also relied on the statements of Plaintiff's own physician, Dr. Moore, who had asserted that Plaintiff's hypertension was being controlled with medication and that his sleeping habits had improved. (*Id.*). Moreover, Mercer noted that sleep disorders were common in certain professions and among certain types of workers, and that different methods were found to be successful in combating this problem, all in support of its opinion that such a condition is not a disability.

The initial reports indicated that Plaintiff was suffering from a condition which required rest and treatment, but that in time he would be able to return to work, albeit under a modified schedule. Therefore, the information which was considered was sufficient to support the conclusion reached by Mercer, and subsequently adopted by Dow Jones. Moreover, Plaintiff's subsequent refusal to return to work and at least attempt the proposed revised schedule makes

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15. As previously noted, the Plan defines "totally disabled" as being "unable to do *all* the duties of your regular job . . ." (Wilck Cert., Ex. U at 70) (emphasis added).

his entitlement to long-term disability benefits an uncertainty. It is quite possible that Plaintiff's condition had improved to the point where he was able to work under the modified schedule.

Accordingly, the denial of Plaintiff's application for benefits was not arbitrary or capricious, and must not be disturbed by this Court. Therefore, Dow Jones' motion for summary judgment on Plaintiff's claim based on the denial of long-term disability benefits will be granted and this claim will be dismissed.

III. *Plaintiff's Claim for Punitive Damages*

Defendant's motion for summary judgment on Plaintiff's separate claim for punitive damages must be granted as I have already found that Plaintiff's other claims must be dismissed.

CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment will be granted. Accordingly, this action will be dismissed in its entirety. An appropriate order follows.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

Dated: April 15, 1998

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civ. No. 96-3786 (DRD)

WILLIAM R. SCHEFFLER,

Plaintiff,

v.

DOW JONES & COMPANY,

Defendant.

ORDER

This matter having been opened to the Court by Michael K. Furey, Esq., of Riker, Danzig, Scherer, Hyland & Perretti, attorneys for Defendant, on a motion for summary judgment, and notice having been given to all parties, in consideration of the papers submitted, for good cause shown, and for the reasons set forth in the Court's opinion of even date,

IT IS, on this 15th day of April 1998, ORDERED that Defendant's motion for summary judgment is granted and this action dismissed in its entirety.

s/ Dickinson R. Debevoise
Dickinson R. Debevoise, U.S.S.D.J.

APPENDIX C — EXCERPTS FROM DEPOSITION OF ROBERT G. O'NEILL DATED OCTOBER 29, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 96-3786(DRD)

CIVIL ACTION

WILLIAM R. SCHEFFLER,

Plaintiff

v.

DOW JONES & COMPANY,

Defendant

DEPOSITION OF:
ROBERT G. O'NEILL

DEPOSITION of the above-named witness taken by and before Georgia Mandes, a Notary Public and Certified Shorthand Reporter of the State of New Jersey, held at Dow Jones & Company, 200 Liberty Street, New York, New York, on Wednesday, October 29, 1997 commencing at 1:30 p.m.

* * *

Appendix C

[7] O'Neill – direct

* * *

Q What is your educational background, sir?

A I have a B.A. degree from Johns Hopkins University and that's it.

Q Do you hold any other type of diplomas where you might have gone for, or taken courses relating to disability claim work or anything of that nature?

A I've taken many courses, I've been to many seminars but to answer the question no, I don't have any other diplomas or certificates of such, yes.

Q As a disability claim consultant for Mercer, what is it that you do?

A Well, the primary function is to administer long-term disability claims for client firms. We have about, presently around six or seven companies in addition to Dow Jones for whom we handle their long-term disability claim.

What we do essentially is evaluate these claims and then make a recommendation to the client firm and [8] they decide whether they're going to agree with us or not, and go ahead and either approve or deny the claim.

Our function primarily is to just make a recommendation based on our own analysis of the claim.

Q When you make that recommendation that's obviously I guess based on data that's provided to you?

A Yes, right.

Q Is that provided to you by your clients, or?

A Some of it is, but very, very little to tell you the truth. In all cases we're provided with a standard long-term disability claim form filled out by the attending physician, which has a very limited amount of information. So the general procedure is to go back to the attending physician or physicians, if there's more than one, and ask for copies of their medical records and a number of other things. Sometimes we arrange for medical exams and so forth, but we base it and we have to base it on whatever medical documentation we can get our hands on.

* * *

[10] Q What would be the intermediate step?

A It may be reviewed by a physician or some other medical person in the company, and then depending on what they say, then we make a recommendation.

Q Okay. What is the interplay within Mercer of a person at your level and the physicians that you're referring to?

A Well, it's, we have access to a physician and we used to have access to nurses at the time that Mr. Scheffler was claiming but she's no longer with the company. And if I

don't understand something in the medical records, if there are laboratory results, test results or something and I'm not completely familiar with and I don't understand, I'll refer to them for their opinion and have them pass judgment on what's involved, but that's not always the case.

Some claims that come in are very clear cut that the medical evidence we get is so overwhelming in demonstrating the person is disabled or something that we don't need to do that, but on certain cases we do refer to a doctor first before we make a recommendation.

[11] Q Is it done at your discretion that you refer?

A Yes, yes.

Q So you don't have to have a physician review your findings?

A No, that's correct.

Q So when you determine that you need the input of a physician that's when the physician's input is obtained?

A Exactly.

Q Relating to Mr. Scheffler, was there any input within Mercer of any physician or physicians in the company?

A Yes, there was. In this case it was a nurse who was on the staff at the time she was actually manager of our department of our unit, the claim unit and she reviewed this. I gave it to her immediately and we got it.

Appendix C

Q What was her name? What is her name?

A Her name is Kate Hansum.

K-A-T-E H-A-N-S-U-M.

Q And she's the woman that you said is no longer working for the company?

A Yes. She no longer, at least in our . . .

* * *

[16] * * *

Q Aside from The Disability Advisor, what other book?

A Well, let's see, I myself have some guidelines that I got many years ago, from where I don't recall, but it's a similar thing. It's just not as comprehensive as Dr. Reed's.

Q In The Disability Advisor book, are sleep disorders part of that?

A No, unfortunately not, no.

Q They're not?

A They're not.

Q And how about the other material that you said that you compiled yourself? Does that include sleep disorders?

A No, no. In fact, I don't recall ever finding anything within our office, any written textbooks or anything that have information about sleep disorders. I myself have some. I have my own collection of medical books and so forth, but at home. I don't think the office had any.

* * *

[21] (Dow Jones Plan marked as P-1 for identification.)

Q I show you what's been marked as Exhibit 1. Are you familiar with that document?

A Yes, I am.

Q And are you looking at page 70 of that document?

A Yes.

Q And does that describe on the Dow Jones plan someone who's totally disabled?

A Yes, it does.

Q Why don't we refer during the first 24 months, it says you are unable to do all of the duties of your regular job?

A That's correct.

Q When I asked you about sleep disorder which you indicated a type of sleep disorder that you explained you

said was not in your estimation disabling, would that fit within this definition of disabling?

MR. FUREY: I'm going to object to the question, in terms of this expert not being — of this witness not being an expert witness. I'm not his attorney, so.

[22] MR. COHEN: He's objected but you've answered and I guess you can elaborate. Why did you say yes to that answer?

A Repeat the question.

(Question read)

A Yes, I would have to answer yes, because we would apply this definition without question to every Dow Jones claim that we get. And if we feel that the particular condition for which the claim is being made does not conform to this definition, we would deny the claim.

We felt that the person could work even if it's say part-time. We would consider them not totally disabled, and therefore they will not be qualified under the terms of the LTD plan.

Q Although the LTD plan says unable to do all of the duties of your regular job?

A Yes.

Q Okay. But you read that to mean that if you could perform your duties on a part-time basis that would mean that you're not?

A Then you can be considered — that's pretty standard throughout the industry.

* * *

[25] Q So without those, or an extra component the sleep disorder in and of itself the type that Mr. Scheffler has would not be disabling?

A That would be our position based on the information I got from our medical staff, yes. That just that in and of itself, apart from any other facts would not prove that he was totally disabled or would not establish that he's totally disabled.

Q Now, what is your understanding of Scheffler's claim as far as the sleep disorder? What is he claiming caused the sleep disorder and what is the sleep disorder?

MR. FUREY: Well, you're saying this as of the time?

MR. COHEN: That he considered the application.

MR. FUREY: Considered the application.

A Well, his argument that had been and I guess still is that it was because of frequent change in his shift schedule,

because he was a swing man and his hours of work changed frequently, that this was causing a disturbance in his sleep pattern and he was extremely fatigued and was not able to concentrate very well. And also that he had, along with his . . .

* * *

APPENDIX D — FORMAL WRITTEN JOB DESCRIPTION OF PETITIONER'S FORMER POSITION WHEN EMPLOYED BY DOW JONES & COMPANY

NEWSCASTER/WRITER

Duties include selecting appropriate stories from various sources, and writing them as cohesive scripts of prescribed length. Also broadcast these scripts on radio news services.

APPENDIX E — EXCERPT FROM DOW JONES & COMPANY'S EMPLOYEE BENEFITS HANDBOOK

[commencing at page 70]

* * *

LONG-TERM DISABILITY (LTD) BENEFITS

When Benefits Are Paid

LTD benefits can begin after your benefits from the STD program end, or after you have been totally disabled for at least 180 days, whichever is later. At that time, if you satisfy the definition of disability described below, you will become eligible for a monthly LTD benefit.

Definition of Disability

To receive LTD benefits you must be considered "totally disabled," which means that:

- During the first 24 months of LTD benefits, you are unable to do all of the duties of your regular job,

  and

- After 24 months of LTD benefits, your disability prevents you from doing any gainful work for which you are reasonably qualified by training, education or experience.

LTD benefits will not be paid during any period when you are not under the regular and continuing care of a physician, although you need not be confined solely to your home or a hospital. See page 74 for information about providing medical evidence of your disability.

* * * *